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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1123

JACKSON FARMERS, INC. (Formerly Farmers Union Co-Operative Business Association),
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND APPENDIX

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND APPENDIX

Jackson Farmers, Inc. (formerly Farmers Union Co-operative Business Association) prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Circuit Court is reported at ..... F.2d ..... A copy of this opinion is appended hereto.

JURISDICTION

The judgment was entered on September 30, 1970. A petition for rehearing was denied on October 28, 1970. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254.

APPLICABLE STATUTORY PROVISIONS

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Section 151, et seq.) (hereinafter called the "Act"), and of the Administrative Procedure Act, 5 U.S.C.A. 557(c), are set forth in Appendix E infra.

QUESTION PRESENTED

Did the National Labor Relations Board err in finding Jackson Farmers, Inc. (hereinafter referred to as "petitioner" or "employer") violated Section 8(a)(5) of the Act when it refused to bargain with a newly certified union after the Board denied the employer's request for review of the Regional Director's unit determination on the grounds that it did not raise substantial issues warranting review, and that thereafter the Board failed to make its own determination or give plenary review to the Regional Director's determination when issuing an unfair labor practice order based on such determination, although Section 10(c) of the Act requires that the Board itself must determine if a party has committed an unfair labor practice?

STATEMENT OF THE CASE

Upon two separate petitions for certification of collective bargaining representative being filed pursuant to Section 9(c) of the Act by the American Federation of Grain Millers, AFL-CIO (hereinafter called the "Union"),

a hearing was held on November 1, 1968 before a hearing officer designated by the Regional Director for the Seventeenth Region of the National Labor Relations Board (hereinafter called the "Board"). The issue in the hearing was whether or not the service station employees should be included in the same unit as the elevator and feed mill employees, and whether or not there was a sufficient number of the work complement available to participate in the elections since this was the off season in the employer's operation and less than fifty per cent (50%) of the complete work complement was employed at that time. On November 26, 1968 the Regional Director for Region Seventeen issued: (1) a decision and direction of election in an appropriate unit of the respondent's employees consisting of office clerical employees; and (2) a decision and direction of election in an appropriate unit of respondent's employees consisting of production and maintenance employees. Pursuant to the Regional Director's decision and direction of election and after the employer's petition for review had been denied by the Board, elections by secret ballot were conducted in the two appropriate units. Both units designated the Union as their collective bargaining representative. The Union was certified by the Regional Director as bargaining agent in the two units. The employer thereafter filed on the 25th day of February, 1969 a timely request for review of the Seventeenth Regional Director's Supplemental Decision and Certification of Representative which established the two bargaining units as aforesaid and excluded one clerical employee as ineligible because she, as wife of the manager, received "special treatment." The employer contended that the Regional Director's exclusion of this clerical employee and voiding her ballot was not based upon reasonable grounds and was therefore arbitrary and capricious. On or about March 7, 1969 the Board, by

telegraphic order, denied the Company's request for review of the Regional Director's Supplemental Decision and Certification as it "raised no substantial issues warranting review."

On March 18 the Union filed charges alleging that the employer had refused to bargain with it in violation of Section 8(a)(5) of the Act. The employer admitted its refusal to bargain and stated that its sole objective in so doing was to test the validity of the certification. The employer asserted: (1) that its operation is seasonal, and that the election was conducted at a time of the year when only fifty per cent (50%) of the peak season work complement was employed; (2) the service station employees which were included with elevator and feed mill employees had little or no community of interest; and (3) a clerical employee, whose vote could have determined the results of the election, was disenfranchised by the Regional Director because she received special treatment as wife of the manager.

Counsel for the General Counsel filed a motion for summary judgment on May 2, 1969 and the Trial Examiner's decision issued without a hearing on or about July 9, 1969. On August 13, 1969 the Company filed timely exceptions to the Trial Examiner's decision with a supporting brief. On September 5, 1969 the Board issued its decision and order affirming without comment the rulings, findings, conclusions and recommendations of the Trial Examiner. Neither the Trial Examiner's decision nor the Board's decision and order included an independent determination concerning the appropriate bargaining unit. Upon the Board's petition for enforcement, the United States Court of Appeals for the Tenth Circuit, under the authority of Section 212 of Title 28, United States Code, enforced the Board's order. In so doing, the Court spe-

cifically disagreed with the respondent's contention that the Second Circuit's decision in *Pepsi-Cola Buffalo Bottling Company* v. *N.L.R.B.*, 409 F.2d 676 (C.A. 2, 1969), and *N.L.R.B.* v. *Clement-Blythe Companies*, 415 F.2d 78 (CA 4, 1969), were controlling, and based its decision upon *N.L.R.B.* v. *Magnesium Casting Company*, 427 F.2d 114 (C.A. 1, 1970), petition for writ of certiorari granted on October 12, 1970.

REASONS FOR GRANTING THE WRIT

Under Section 10(c) of the National Labor Relations Act, the Board is required to review a regional director's findings of fact and decision in a representation proceeding and to make its own determination in an unfair labor practice proceeding before deciding whether or not an unfair labor practice has been committed. The decision of the Court of Appeals condones a procedure prohibited by the specific language of Section 10(c) of the Act by permitting a regional director's finding of fact and decision to be the basis of an unfair labor practice finding without any Board review and the decision or independent determination of the issues represented in a representation proceeding.

Section 10(c) of the Act specifically provides that the Board itself must determine if a party has committed an unfair labor practice. See *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 447 (1951). Merely because the issue in a representation proceeding was ruled upon by the Regional Director does not relieve the Board of its statutory responsibility. Clearly, if there had been no representation proceeding and the charges arose strictly out of an unfair labor practice charge, a full hearing of the issue is mandatory with a trial examiner hearing the evidence and making his own findings of fact and conclusions of

law based on the evidence introduced before him with the Board, pursuant to Section 10(c), affording full review of such findings and conclusions.

The issue before the Court is whether Section 3(b) of the Act, which provides a regional director with authority to rule in representation proceedings only, relieves the Board of its duty and responsibility to rule on all issues presented in unfair labor practice proceedings. The Second and Fourth Circuit Courts of Appeals in *Pepsi-Cola*, supra, and in *Clement-Blythe*, supra, respectively, have answered the question in the negative, while the First Circuit in the *Magnesium* case, supra, has answered in the affirmative. The question of whether or not the party is entitled to a full Board review in an unfair labor practice proceeding of a regional director's representation decision is of crucial importance to all parties to the Board proceedings and the existing conflict results in conflicting Board practices determined according to the circuit in which the case is pending. Furthermore, the conflict encourages circuit hunting in an effort to obtain jurisdiction in that circuit court which is most receptive to the particular party's posture in this matter.

Under Section 3(b) of the Act, the Board may delegate to its regional directors its powers, "Under Section 9 to determine the unit appropriate for the purposes of collective bargaining." Discretionary review is permitted by the Board under 29 C.F.R. 102.67(c) for one or more of the following reasons:

(1) That a substantial question of law or policy is raised because of (a) the absence of, or (b) a departure from official reported Board precedent.

(2) That the Regional Director's decision on a substantial factual issue is clearly erroneous upon a

record and such error prejudicially affects the rights of a party.

(3) That the conduct of a hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board policy or rule.

The employer herein filed a request for review based on the above, and it was denied by the Board because it "raised no substantial issues warranting review." Thus leaving the Regional Director's decision as the only determination on the issue. There is no evidence that the Trial Examiner and/or the Board reviewed the record, although 29 C.F.R. 102.67(d) states the "request for a review" must be a document "enabling the Board to rule on the basis of its contents without the necessity of recourse to the record." Thus, the aforesaid Board rules do not require a full and independent review of the record in making a representation determination. But 10(c) of the Act requires the Board to make a full and independent review in an unfair labor practice determination. It is this failure of the Board to perform its functions pursuant to Section 10(c) of the Act which the employer respectfully submits is in violation of 5 U.S.C. Section 557 (c).

In *Pepsi-Cola*, supra, Judge Kaufman, in holding that the Board itself must decide whether an unfair labor practice has been committed, stated:

"In an unfair practice proceeding, the Board cannot completely abdicate its responsibility to a Regional Director, a functionary whose appointment is not even subject to consideration by the Senate, as are those of the Board members. (*5) Moreover, the Board's experience is particularly relevant and desirable in

deciding complex issues relating to the appropriate bargaining unit before the potent sanctions arising from the finding of an unfair labor practice are involved. (*6) See NLRB v. Jones & Laughlin Steel Corp., 331 U.S. 41 (1957); Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947).

"(*5) '(A)nother risk is that subordinates will be less competent than agency heads, particularly where the superiors have been selected for their expertise in a certain field. In such a situation private parties have a strong claim to the personal attention of the agency heads.' Note, Subdelegation by Federal Administrative Agencies, 12 Stan. L. Rev. 808, 812 (1960). Cf. Porter v. Roach, 69 F. Supp. 56 (D. Ore. 1946).

"(*6) But the Supreme Court has indicated that a court's deference to the Board is not limited to issues involving the Board's expertise but extends to situations such as this, where the decision rests on the common law of agency, a law which a court might apply as effectively as the Board. NLRB v. United Insurance Co., 390 U.S. at 260."

The expertise of the Board members is the basis for their selection as agency heads. While Section 3(b) of the Act provides for the Regional Director's authority to rule in Section 9 proceedings, which are limited to representation proceedings, nowhere is the Board permitted to delegate its final authority in unfair labor practice proceedings which bear the possibility of findings of unfair practices and court enforceable remedial orders. Where an integral part of those unfair labor practice proceedings involves a representation matter, the litigants are entitled to the personal attention of the Board members and the reflection of their expertise, which Congress considered in approving their appointments. While Congress permitted regional directors more discretion in representation proceedings, it also maintained the added insurance

that the regional directors' decisions would be permitted review by the Board. See 2 NLRB Legislative History of the Labor-Management and Disclosure Act of 1959, 1811-12 (1959). By failing itself to determine the issues raised before it in the present case, the Board has acted contrary to the explicit intent and direction of Congress in Section 10(c) of the Act and has deprived the employer of its specific rights as a litigant under the Act. *Pepsi-Cola Buffalo Bottling Co.* v. *N.L.R.B.*, supra.

Although the Board argued in its brief to the First Circuit Court that the representation and unfair labor practice proceedings are "really one and a single trial of the representation issue is enough," relying on *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146 (1941), it is clear not only from a reading of the Act, but also from the same case the Board cites that the Board in fact must make a determination of its own on the unit issue when it becomes a relevant issue in an unfair labor practice proceeding. Section 3(b) of the Act, which was a post-1941 amendment to the Act, permits the Board to delegate its power under Section 9 to a regional director in a representation matter only. The sole purpose of this delegation was to expedite the election process so as to determine matters affecting representation as promptly as possible. At the time of the *Pittsburgh Plate Glass* case, in 1941, the Section 3(b) delegation to the regional director of Section 9 powers did not exist, so no contemplation was made of an occasion when the Board would not rule on a unit issue in an unfair labor practice proceeding. In *Pittsburgh Plate Glass* the Board itself in fact did rule on the unit issue. Clearly the Board would not be required to rule twice on the same evidence on the unit issue. The Board is required to rule at least once on the unit issue!

The First Circuit Court states that Congress intended to expedite all case handling in representation and unfair labor practice proceedings by the Section 3(b) amendment. If so, why did Congress limit the regional director's authority to the Board's Section 9 representation powers? If the only issue in a refusal to bargain complaint was the unit issue, then the Court would be left with the duty to review only the Regional Director's determination, and not that of the Board, as so empowered in Sections 10(e) and 10(f) of the Act.

Furthermore, the procedure used by the Board in this case does not comply with the Administrative Procedure Act, 5 U.S.C. 557(c), which requires that:

> All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—
>
> (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record. . . .

Nowhere in the record before this Court did the Board state its reasons or basis for making its findings or reaching its conclusions. The Board's only action was to say that the employer's request for review in the representation proceedings raised "no substantial issues *warranting* review."

That this method of handling an unfair labor practice proceeding is proscribed was also stated by Circuit Judge Butzner in *N.L.R.B.* v. *Clement-Blythe Companies*, 415 F.2d 78 (C.A. 4, 1969), at 81:

> "When the Board rules that an employer has committed an unfair labor practice, the employer is entitled to know, and the Board is charged with the duty of stating the reasons why the Board concluded the

> facts showed a violation of the law, cf. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 195 (1941); 2 David, Administrative Law Sec. 16.12 (1958). No statutory exception to this rule exists because critical elements of the controversy were determined preliminarily by the Regional Director in the representation proceedings. The Board, not the Regional Director, has the responsibility of deciding complaints of unfair labor practice. 29 U.S.C. Sec. 160(c).".

In view of the conflict of the First Circuit Court with the Second and Fourth Circuit Courts on the important issues of the scope of a regional director's authority in determining unfair labor practice charges and the degree to which the Board may or may not delegate its authority to decide unfair labor practices to the regional director, this Court must insure the orderly and proper administration of the Act by resolving these issues.

CONCLUSION

For the reasons set forth above, and because This Honorable Court has granted a petition for certiorari in *Magnesium Casting*, on which the Tenth Circuit relied in making its determination herein presented, it is urged this petition for certiorari be granted and this case be remanded to the Tenth Circuit so that it can determine the matter in agreement with the decision to be handed down by this Court in *Magnesium Casting*.

Respectfully submitted,

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December 15, 1970.

APPENDIX A

TXD-386-69
Holton, Kansas

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

Cases Nos. 17-CA-3836-1
17-CA-3836-2

FARMERS UNION CO-OPERATIVE BUSINESS ASSOCIATION

and

AMERICAN FEDERATION OF GRAIN MILLERS, AFL-CIO

Frederick C. Herzog, Esq., for the General Counsel.
William G. Haynes, Esq., (*Lillard, Eidson, Lewis & Porter*), Topeka, Kan., for the Respondent.

Trial Examiner's Decision

Statement of the Case

The Representation Proceedings[1]

Upon petitions filed under Section 9(c) of the National Labor Relations Act (29 U.S.C.A. 159(c)) on October 1,

1. Administrative or official notice is taken of the record in the representation proceedings, Cases Nos. 17-RC-5851 and 17-RC-5874, as the term "record," is defined in Section 102.68 and 102.69(f) of the Board's rules (Rules and Regulations and Statements of Procedure, National Labor Relations Board, Series 8 as amended). See *LTV Electrosystems, Inc.*, 166 NLRB No. 81, enf'd 388 F. 2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB No. 24; *Intertype Co. v. Penello*, 269 F. Supp. 573 (D.C. Va. 1967); *Intertype Co. v. N.L.R.B.*, 401 F. 2d 41 (C.A. 4, 1968); *Follett Corp., et al.*, 164 NLRB No. 47, enf'd 397 F. 2d 91 (C.A. 7, 1968); Section 9(d) of the National Labor Relations Act.

1968 in Case No. 17-RC-5851 and on October 25, 1968 in Case No. 17-RC-5874, by the American Federation of Grain Millers, AFL-CIO, herein called the Union, a hearing was held on the question of representation presented in the two cases, pursuant to a Notice of Representation Hearing and Order Consolidating Cases, on November 4, 1968, before a Hearing Officer of the National Labor Relations Board. Thereafter on November 26, 1968, the Regional Director for Region 17 pursuant to Section 102.72(a)(4) and (c) of the Board's Rules, severed Case No. 17-RC-5851 from Case No. 17-RC-5874 and issued, on the same day, (1) a Decision and Direction of Election in Case No. 17-RC-5851 in an appropriate unit of Respondent's employees described hereinafter and (2) a Decision and Direction of Election in Case No. 17-RC-5874 in an appropriate unit of Respondent's employees described hereinafter.

On December 9, 1968, Respondent filed with the Board in Washington, D.C., a petition for review of the Regional Director's Decision and Direction of Election in Case No. 17-RC-5851. On December 23, 1968, the Board denied Respondent's petition for review. No request for review of the Decision and Direction of Election was filed in Case No. 17-RC-5874.

Pursuant to the respective directions of election, elections by secret ballot were conducted on December 31, 1968, among the employees in the appropriate units to determine the question concerning representation. Upon conclusion of the balloting, tallies of the ballots in both elections were prepared. In Case No. 17-RC-5851, of a total of approximately 17 eligible voters, 13 cast ballots for the Union, 3 cast ballots against the Union, no ballots were challenged and no ballots were void. In Case No. 17-RC-5874, of a total of approximately 4 eligible voters, 2 cast ballots for the Union, one ballot was cast against

the Union, one ballot was challenged, and no ballots were void. The challenged ballot in Case No. 17-RC-5874 was sufficient to affect the results of the election.

No objections to conduct affecting the results of election were filed in Case No. 17-RC-5851, and, accordingly, on January 15, 1969, the Regional Director issued and duly served on the Respondent and the Union a Certification of Representative, certifying the Union as the representative for the purposes of collective bargaining for the employees in the appropriate unit. No objections to conduct affecting the results of the election were filed in Case No. 17-RC-5874. The challenged ballot was then investigated pursuant to Section 102.69 of the Board's Rules and on February 13, 1969, the challenge to said ballot was sustained, and the Regional Director issued a Supplemental Decision and Certification of Representative, in Case No. 17-RC-5874 certifying the Union as the representative for the purposes of collective bargaining for Respondent's employees in the appropriate unit. On February 26, 1969, Respondent filed a request for review of the Reginal Director's Supplemental Decision and Certification of Representative in Case No. 17-RC-5874. The Regional Director for Region 17 declined to consider the Respondent's request for review as a motion for reconsideration, and on March 7, 1969, the Board denied the Respondent's request for review.

The Complaint Case

On March 18, 1969, the Union filed a charge in Case No. 17-CA-3836-1 alleging that since on or about February 5, 1969, the Respondent had refused to bargain with the Union as the duly designated representative of a majority of the employees in the unit found appropriate in Case No. 17-RC-5851, and thus had violated Section 8(a)

(1) and (5) of the Act. Also on March 18, 1969, the Union filed another charge, in Case No. 17-CA-3836-2, alleging that since on or about February 26, 1969, the Respondent had refused to bargain with the Union as the duly designated representative of a majority of the employees in the unit found appropriate in Case No. 17-RC-5874 in contravention of the Regional Director's Decision in Case No. 17-RC-5874 and thus had violated Section 8 (a)(1) and (5) of the Act.

On April 11, 1969, the General Counsel, by the Regional Director for Region 17, issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in these cases alleging that the Respondent had committed unfair labor practices in violation of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act by refusing to bargain with the Union upon request in the two units. In due course, on April 24, 1969, the Respondent filed its Answer to the Complaint in which it admitted certain allegations of the complaint and denied others.

In its Answer, the Respondent admitted the following allegations of the complaint: (1) filings and service of the charges, (2) certain jurisdictional facts, (3) that the Union is a labor organization within the meaning of Section 2(5) of the Act, (4) the facts of the representation proceedings cited above including the appropriateness of each unit, (5) the Union's requests to bargain collectively and the Respondent's refusal. Respondent further admitted that it has continued to refuse to recognize and bargain with the Union and admitted that its sole objective in so doing is to test the validity of the Regional Director's respective certifications of representative in Cases Nos. 17-RC-5851 and 17-RC-5874, by means of Board review and court decision. Respondent admitted the fact of the election and certification, but denied the validity of

the election and certification, asserting with regard to the unit in Case No. 17-RC-5851 that the employer's operation is seasonal and that the election was conducted at a time when the work complement was approximately only 50 percent of the peak season complement, and further asserting with regard to the election in Case No. 17-RC-5874, that the challenge to the ballot which affected the results of the election, was improperly sustained. Respondent, in sum, denied that it is engaging in any unfair labor practices affecting commerce.

Under date of May 2, 1969, received May 5, 1969, counsel for General Counsel filed a Motion for Summary Judgment, in which he contends that the pleadings, considered together with the official Board record in the underlying representation proceedings in Cases Nos. 17-RC-5851 and 17-RC-5874, raise no factual issues requiring a hearing, that Respondent's Answer alleges no newly discovered evidence or evidence not available at the time of the representation proceedings, and that, as a matter of law, Respondent has no valid defense to the complaint.

On May 6, 1969, I issued an Order on the General Counsel's Motion for Summary Judgment, returnable May 23, 1969, directing the parties to show cause as to whether or not General Counsel's Motion should be granted. The order stated *inter alia* that "if no response disclosing material unresolved issues litigable before and requiring hearing by a Trial Examiner is filed by May 23, 1969, the Motion for Summary Judgment may be granted forthwith." No responses *were* received to the Order.

Ruling on Motion for Summary Judgment

In its Answer, Respondent contends that its refusals to bargain collectively are fully justified because the

Union has been illegally certified as the bargaining representative for the units involved herein. Respondent asserts that the election in the unit involved in Case No. 17-RC-5851 was conducted at a time of the year when the work complement was approximately 50 percent of the peak season's complement, and that the employer's operation in said unit is seasonal in nature. Further, Respondent asserts that the challenge to the ballot, affecting the results of the election in the unit involved in Case No. 17-RC-5874, was improperly sustained.

With regard to Case No. 17-RC-5851, the question of the size of the appropriate unit was ruled on by the Regional Director in his Decision and Direction of Election, dated November 26, 1968, at page three thereof, and at that time Respondent's contention that since its operation is seasonal in nature no election should be held until the spring of 1969 when it was to add additional employees, in keeping with its practice, was rejected. With regard to Case No. 17-RC-5874, the issue of the challenged ballot was decided by the Regional Director in the Supplemental Decision and Certification of Representative, dated February 13, 1969. Respondent's request for review in Case No. 17-RC-5874 was denied by the Board on March 7, 1969. Respondent's contentions were thus fully litigated and decided in the prior representation proceedings and Respondent has offered no new or previously unavailable evidence to support its present assertions.

It is established Board policy, in the absence of newly discovered or previously unavailable evidence or special circumstances not to permit litigation before a Trial Examiner in an unfair labor practice case of issues which were or could have been litigated in a prior related rep-

resentation proceeding.[2] This policy is applicable even though no formal hearing on objections has been provided by the Board. Such a hearing is not a matter of right unless substantial and material issues are raised;[3] and that there are not such issues here has been effectively decided by the Board.

In the representation proceedings, the Respondent presented, or had opportunity to present, all its present contentions concerning the validity of the election and the certification. The Respondent is thus seeking to relitigate the Board's determinations in the representation proceedings. There being no unresolved matters requiring an evidential hearing, the Motion of the General Counsel for Summary Judgment is granted, and I hereby make the following further:

Findings and Conclusions

I. The Business of the Respondent

Farmers Union Co-operative Business Association is, and has been at all times material herein, a Kansas corporation with its principal place of business at Holton, Kansas. It operates grain elevators at Holton, Valley Falls, and Mayetta, and a feed mill at Denison, also in Kansas. It also operates petroleum service stations at Holton and Denison, a fertilizer department and store at Holton, and a petroleum bulk plant at Denison.

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2. *Howard Johnson Company*, 164 NLRB No. 121; *Metropolitan Life Insurance Company*, 163 NLRB No. 71; *Krieger-Ragsdale & Co., Inc.*, 159 NLRB 490, enf'd 379 F. 2d 517 (C.A. 7, 1967), cert. den. 389 U.S. 1041; *N.L.R.B.* v. *Macomb Pottery*, 376 F. 2d 450 (C.A. 7, 1967). See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); NLRB Rules and Regulations, Section 102.67(f) and 102.69(c).

3. *O. K. Van and Storage, Inc.*, 127 NLRB 1537, enf'd 297 F. 2d 74 (C.A. 5, 1961). See *Air Control Window Products, Inc.*, 355 F. 2d 245, 249 (C.A. 5, 1964): "If there is nothing to hear, then a hearing is a senseless and useless formality." See also *N.L.R.B.* v. *Bata Shoe Co.*, 377 F. 2d 821, 826 (C.A. 4, 1967).

In the course and conduct of its business, the Respondent annually sells and distributes products, the gross value of which exceeds $500,000. The Respondent annually receives goods valued in excess of $50,000 transported to its place of business in interstate commerce directly from states of the United States other than the State of Kansas. Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

With regard to Case No. 17-RC-5851, the following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees of Farmers Union Co-operative Business Association at its Holton, Denison, Mayetta, and Valley Falls, Kansas locations, including service station employees, tankmen, truck drivers, mechanics, regular part-time employees, and regular seasonal employees, but EXCLUDING office clerical employees, temporary employees, and professional employees, guards, and supervisors within the meaning of the Act.

With regard to Case No. 17-RC-5874, the following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time office clerical employees of Farmers Union Co-operative Business As-

sociation, EXCLUDING all other employees and professional employees, guards, and supervisors within the meaning of the Act.

On December 31, 1968, a majority of Respondent's employees in each unit designated and selected the Union as their collective-bargaining representative in secret-ballot elections conducted under the supervision of the Regional Director of Region 17 of the National Labor Relations Board. On January 15, 1969, the Regional Director certified the Union as the collective-bargaining representative for the unit of employees designated in Case No. 17-RC-5851 and on February 13, 1969, the Regional Director certified the Union as the collective-bargaining representative for the unit of employees designated in Case No. 17-RC-5874. From January 15, 1969 in Case No. 17-RC-5851 and from February 13, 1969 in Case No. 17-RC-5874, and at all times since, the Union has been the collective-bargaining representative of a majority of the employees in the above-mentioned units and by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all the employees in said units for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

On or about January 22, 1969, the Union requested the Respondent to bargain collectively with respect to rates of pay, wages, hours of employment and other terms and conditions of employment of the employees in the unit found appropriate in 17-RC-5851. On or about February 5, 1969, and at all times since, Respondent has refused to bargain collectively with the Union.

On or about February 26, 1969, the Union requested Respondent to bargain collectively with respect to rates of pay, wages, hours of employment and other terms and

conditions of employment of the employees in the unit found appropriate in Case No. 17-RC-5874. On or about February 27, 1969, and at all times since the Respondent refused to bargain collectively with the Union.

By these refusals to bargain with the Union, the duly designated representative of the employees in each unit, Respondent engaged in, and is engaging in, unfair labor practices in violation of Section 8(a)(5) of the Act and is interfering with, restraining and coercing its employees in violation of Section 8(a)(1) of the Act.

The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings and conclusions and the entire record in the case, I recommend that the Board issue the following:

ORDER

A. For the purpose of determining the effective period of the certification, the initial year of certification shall be deemed to begin on the date(s) the Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate units.[4]

B. Farmers Union Co-operative Business Association, Holton, Kansas, its officers, agents, successors and assigns, shall:

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4. The purpose of this provision is to ensure that the employees in the appropriate units will be accorded the services of their selected bargaining agent for the period provided by law. See *Mar-Jac Poultry Co., Inc.*, 136 NLRB 785; *Commerce Co. d/b/a Lamar Hotel*, 140 NLRB 226, 229, 382 F. 2d 600 (C.A. 5); *Barnett Construction Co.*, 149 NLRB 1419, 1421, 350 F. 2d 57 (C.A. 10, 1965), cert. denied 379 U.S. 817 (1964).

1. Cease and desist from:

(a) Refusing to bargain collectively with American Federation of Grain Millers, AFL-CIO, as the exclusive collective-bargaining representative of the employees in the following appropriate units:

> All production and maintenance employees of Farmers Union Co-operative Business Association at its Holton, Denison, Mayetta, and Valley Falls, Kansas locations, including service station employees, tankmen truck drivers, mechanics, regular part-time employees, and regular seasonal employees, but EXCLUDING office clerical employees, temporary employees, and professional employees, guards, and supervisors within the meaning of the Act.
>
> All full-time and regular part-time office clerical employees of Farmers Union Co-operative Business Association, EXCLUDING all other employees and professional employees, guards and supervisors within the meaning of the Act.

(b) Interfering with the efforts of said Union to negotiate for or represent the employees in the said appropriate units as the exclusive collective-bargaining representative.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request bargain collectively with American Federation of Grain Millers, AFL-CIO, as the exclusive representative of the employees in the appropriate units with respect to rates of pay, wages, hours of work, and other terms and conditions of employment, and embody in a signed agreement any understanding reached.

(b) Post at all its locations in Holton, Denison, Mayetta, and Valley Falls, Kansas, copies of the attached no-

tice marked "Appendix."[5] Copies of said notice, on forms to be furnished by the Regional Director for Region 17, after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director for Region 17, in writing, within 20 days from receipt of this recommended Order, what steps it has taken to comply herewith.[6]

Dated at Washington, D.C.

/s/ Charles W. Schneider
Charles W. Schneider,
Trial Examiner

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5. In the event that this recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

6. In the event that this recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 17, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO THE RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE NATIONAL LABOR RELATIONS BOARD

WE WILL NOT refuse to bargain collectively with the AMERICAN FEDERATION OF GRAIN MILLERS, AFL-CIO, as the exclusive collective-bargaining representative of all our following employees:

> All production and maintenance employees at our Holton, Denison, Mayetta, and Valley Falls, Kansas locations, including service station employees, tankmen, truck drivers, mechanics, regular part-time employees, and regular seasonal employees, but EXCLUDING office clerical employees, temporary employees, and professional employees, guards, and supervisors within the meaning of the Act.
>
> All full-time and regular part-time office clerical employees EXCLUDING all other employees, and professional employees, guards, and supervisors within the meaning of the Act.

WE WILL NOT interfere with the efforts of the Union to negotiate for or represent employees as exclusive collective-bargaining representative.

WE WILL bargain collectively with the Union as exclusive collective-bargaining representative of the employees

in the appropriate units and if an understanding is reached we will sign a contract with the Union.

Farmers Union Co-operative
Business Association
(Employer)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice may be directed to the Board's Regional Office, 610 Federal Building, 601 E. 12th Street, Kansas City, Missouri 64106 (Tel. No. 374-5181).

APPENDIX B

D-3241
Holton, Kansas

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 17-CA-3836-1
17-CA-3836-2

FARMERS UNION CO-OPERATIVE BUSINESS ASSOCIATION

and

AMERICAN FEDERATION OF GRAIN MILLERS, AFL-CIO

Decision and Order

On July 9, 1969, Trial Examiner Charles W. Schneider issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in

certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order, the Recommended Order of the Trial Examiner and hereby orders that Respondent, Farmers Union Co-operative Business Association, Holton, Kansas, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C., September 5, 1969.

Frank W. McCulloch, Chairman
Gerald A. Brown, Member
Sam Zagoria, Member
National Labor Relations Board

(Seal)

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER TERM, 1970

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

JACKSON FARMERS, INC. (FORMERLY FARMERS UNION CO-OPERATIVE BUSINESS ASSOCIATION),

Respondent.

No. 43-70

On Application for Enforcement of an Order of the National Labor Relations Board

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(Filed September 30, 1970)

Janet Skaare Morris (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Elliott Moore, Attorney, National Labor Relations Board) for Petitioner.

William G. Haynes of Eidson, Lewis, Porter & Haynes for Respondent.

Before JONES,* BREITENSTEIN, and HOLLOWAY, Circuit Judges.

BREITENSTEIN, Circuit Judge.

In this proceeding to enforce an order of the National Labor Relations Board, the respondent, Jackson Farmers, Inc., refused to bargain in order to test the validity of the certification of collective bargaining units. The Board found that the Company had violated § 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) and (1). See 178 NLRB No. 56.

In various Kansas small towns the Company operates grain elevators, gasoline service stations, and a feed mill. The American Federation of Grain Millers, AFL-CIO, petitioned for representation elections in two separate units of the Company's employees. These were (1) a unit of production and maintenance employees including truck drivers and service station workers, and (2) a unit of office clerical workers. After a hearing the Regional Director issued a decision and directed an election in each unit. The Company's petition for review of the Director's action was summarily denied by the Board. The production and maintenance employees voted in favor of the Union. The outcome of the election held for the clerical employees depended on one challenged ballot, that of Imogene Kinast, the wife of a supervisor. The Director sustained the challenge with the result that this election also went for the Union. The Board summarily rejected the Company's petition for review of the Director's decision on the challenged ballot.

The Company refused to recognize the Union and to bargain with it. Subsequently, unfair labor practice

*Of the Fifth Circuit, sitting by designation.

charges were brought. The Company defended on the grounds of invalidity of the certification of the production and maintenance unit, the timing of the election so as to prevent voting by seasonal employees, and the ruling on the challenged ballot. The Board sustained the General Counsel's motion for a summary judgment.

The Company argues that it is entitled to a plenary review by the Board of the correctness of the Director's representation determinations before the Board can entertain an unfair labor practice charge based on those determinations. The Board says that the contention was not presented to it and accordingly cannot be considered by the reviewing court. The Company urged before the Board that it was entitled to a new hearing on the representation issues. We need not consider whether the request for a hearing was sufficient to preserve the point because we recently decided in Meyer Dairy, Inc. v. National Labor Relations Board, 10 Cir., ... F.2d ....., that the limited review provided by 29 CFR § 102.67 applies to Board review of any delegated action of a regional director. In so holding we rejected Pepsi-Cola Buffalo Bottling Company v. National Labor Relations Board, 2 Cir., 409 F.2d 676, and followed the rule announced in National Labor Relations Board v. Magnesium Casting Company, 1 Cir., ... F.2d ..... See also National Labor Relations Board v. Gold Spot Dairy, Inc., 10 Cir., ... F.2d ..... The Company does not assert that it has any newly discovered or previously unavailable evidence or that it was prevented from presenting any substantial and material evidence at the representation proceedings. In our opinion the Board summary judgment disposition was proper.

The Board has a wide discretion in determining an appropriate bargaining unit and its decision will be set aside only upon a showing that it is capricious or arbitrary. See § 9(b) of the Act; National Labor Relations Board v.

Dewey Portland Cement Company, 10 Cir., 336 F.2d 117, 119; and National Labor Relations Board v. Groendyke Transport, Inc., 10 Cir., 372 F.2d 137, 140. The representation decisions of a regional director, if not set aside by the Board, are entitled to the same weight as a Board decision. Meyer Dairy, Inc. v. National Labor Relations Board, supra, and National Labor Relations Board v. Magnesium Casting Company, supra.

The Company objects to the inclusion within the production and maintenance unit of service station attendants and a bulk-tank driver because they engage in separate and distinct activities and have no common interest with the others in the unit. The Director found that there was some interchange of work, that all received the same fringe benefits, that there was common supervision, and that there was frequent contact among employees. He concluded that the community of interest was sufficient to warrant inclusion within the unit. On the record presented the unit determination was not arbitrary or capricious and must be sustained. See Mountain States Telephone and Telegraph Company v. National Labor Relations Board, 10 Cir., 310 F.2d 478, 479-480.

Because of the seasonal nature of its operation the Company contends that the Director erred in not deferring the election until the spring when additional workers would be employed. The test of eligibility of seasonal employees to participate in a representation election is "whether an employee is sufficiently concerned with the terms and conditions of employment in a unit to warrant his participation in the selection of a bargaining agent." National Labor Relations Board v. George Groh and Sons, 10 Cir., 329 F.2d 265, 268. The Director held that community of interest of seasonal employees depends on reasonable prospect of re-employment from year to

year. The Company does not challenge this ruling. Applying this test, the Director found that the seasonal employees at the Mayettta location had a reasonable expectancy of re-employment and permitted them to vote. The Company now urges that seasonal employees at its Holton location should have been permitted to vote. We find nothing in the record relating to the rehiring of Holton seasonal employees. In our opinion the Director did not act arbitrarily or capriciously in declining to defer the election.

The outcome of the election in the clerical worker's unit depended on the challenge to the ballot cast by Imogene Kinast, the wife of the Company's general manager. The Director found that the work hours of Mrs. Kinast were "clearly tailored to her personal and family needs" and that she "enjoys a special privileged status as an employee of the Employer because of her marital relationship to the Employer's general manager." The challenge to her ballot was sustained.

The record justifies the finding of special status. Although one who is the wife of the general manager is not within the § 2(3) exclusion from the definition of "employee" of "any individual employed by a parent or spouse," we are of the opinion that in the exercise of its discretion under § 9 the Board may exclude from a bargaining unit an employee who is related to a member of management, but not an owner, and who is granted special privileges. Uyeda v. Brooks, 6 Cir., 365 F.2d 326, 329. In the circumstances presented the rejection of Mrs. Kinast's ballot was not arbitrary or capricious.

The order will be enforced.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
JACKSON FARMERS, INC. (formerly FARMERS UNION CO-OPERATIVE BUSINESS ASSOCIATION),
Respondent.
No. 43-70

Judgment

(Filed October 26, 1970)

Before: JONES*, BREITENSTEIN, and HOLLOWAY, Circuit Judges.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for enforcement of a certain order issued by it against Respondent, Jackson Farmers, Inc. (formerly Farmers Union Co-Operative Business Association), its officers, agents, successors, and assigns on September 5, 1969. The Court heard argument of respective counsel on July 7, 1970, and has considered the briefs and transcript of record filed in this cause. On September 30, 1970, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Tenth Circuit that the said order of the National Labor Relations Board in said proceeding

*Of the Fifth Circuit, sitting by designation.

be enforced, and that the Respondent, Jackson Farmers, Inc. (formerly Farmers Union Co-Operative Business Association), its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

/s/ Jean S. Breitenstein
Judge, United States Court of Appeals for the Tenth Circuit

DATED: October 26, 1970

APPENDIX E

Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal

3(b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, ex-

cept that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

8(a)(5) It shall be an unfair labor practice for an employer—

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Hearings on questions affecting commerce; rules and regulations

9(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted

by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

Reduction of testimony to writing; findings and orders of Board

10(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or

discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

Petition to court for enforcement of order; proceedings; review of judgment

10(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its

member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

Review of final order of Board on petition to court

10(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such

temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

C.F.R. 102.67 (c) and (d)

(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(d) Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record. With respect to paragraph (c) (2) of this section, and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. But such request may not raise any issue or allege any facts not timely presented to the regional director.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1123

JACKSON FARMERS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

This case presents the same basic question involved in *National Labor Relations Board* v. *Magnesium Casting Co.*, 427 F. 2d 144 (C.A. 1), No. 370, this Term, certiorari granted, October 12, 1970. The issue is whether the Board is required to give plenary review to a regional director's representation determination before entering an unfair labor practice order based on that determination. Here, as in *Magnesium Casting*, the regional director determined appropriate bargaining units for the purposes of conducting representation elections. The Board denied petitioner's request that it review the director's representation determination.

413-991—71

When petitioner refused to bargain, an unfair labor practice proceeding ensued; the Board again turned down plenary consideration of the director's representation determination, and upheld its trial examiner's summary judgment that petitioner refused to bargain in violation of Section 8(a)(5) of the Act. On the Board's petition for enforcement, the Tenth Circuit followed the First Circuit's decision in *Magnesium Casting*, as it had in its earlier opinion in *Meyer Dairy, Inc.* v. *National Labor Relations Board*, 429 F. 2d 697, and ruled that the Board need not give plenary review to the director's representation determination.

Although these circumstances customarily would suggest that this Court defer action on the instant petition until its decision in *Magnesium Casting*, the issue now presented was not raised before the Board. In *Magnesuim Casting*, the employer specifically challenged the propriety of the Board's refusal to grant plenary review of the director's representation determination in either the unfair labor practice proceeding or the representation proceeding. In contrast, in this case petitioner urged only that it was entitled in the unfair labor practice proceeding to an evidentiary hearing on its contentions respecting the propriety of the elections conducted by the regional director (Pet. App. A5). The raising of this quite distinct issue[1] was insufficient to apprise the Board that peti-

[1] In *Pepsi-Cola Bottling Co.* v. *National Labor Relations Board*, 409 F. 2d 676 (C.A. 2), certiorari denied, 396 U.S. 904, the court emphasized that its decision did not require the Board "to grant a hearing *de novo* on a proceeding properly delegated

tioner desired it to review the representation determination before issuing an unfair labor practice order.[2] Accordingly, judicial review of the question whether the Board was required to grant plenary review, as distinct from a *de novo* evidentiary hearing, is foreclosed under Section 10(e) of the Act.[3] *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255–256; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350. See *National Labor Relations Board* v. *Brush-Moore Newspapers, Inc.*, 413 F. 2d 809 (C.A. 6), No. 665, 1969 Term, certiorari denied, 396 U.S. 1002.

In these circumstances, the petition should be denied irrespective of the outcome of *Magnesium Casting*.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

JANUARY 1971.

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to a Regional Director," but only "to review what that official has decided and to make its own determination as to whether the Regional Director's decision was right". 409 F. 2d at 681–682.

[2] The court below found it unnecessary to "consider whether the request for a hearing was sufficient to preserve the point" because of its recent decision in *Meyer Dairy* sustaining the procedure utilized by the Board (Pet. App. A18).

[3] That section, in relevant part, provides: "No objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." No such circumstances exist here.

U.S. GOVERNMENT PRINTING OFFICE